United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

75-7177

To be argued by
MILTON HANDLER

United States Court of Appeals

For the Second Circuit

No. 75-7177

LONG ISLAND LIGHTING COMPANY,
Plaintiff-Appellant,

against

STANDARD OIL COMPANY OF CALIFORNIA, TEXACO INC., MOBIL OIL CORPORATION, CHEVRON OIL TRADING COMPANY and TEXACO OVERSEAS PETROLEUM COMPANY,
Defendants-Appellees.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Plaintiff-Appellant,

against

STANDARD OIL COMPANY OF CALIFORNIA, TEXACO INC., MOBIL OIL CORPORATION, CHEVRON OIL TRADING COMPANY and TEXACO OVERSEAS PETROLEUM COMPANY,
Defendants-Appellees.

BRIEF OF DEFENDANTS-APPELLEES

[The names of counsel appear at the conclusion of this brief.]

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Preliminary Statement

This is a consolidated appeal by Long Island Lighting Company (Lilco) and Consolidated Edison Company of New York, Inc. (Con Edison) from a decision of the United States District Court for the Southern District of New York (Wyatt, J.), 1975 Trade Cases ¶60,214, granting the

joint motion of defendants, pursuant to Rule 12(b)(6), Fed. R. Civ. P., to dismiss the antitrust claims of each complaint (the First Claim of the Con Edison complaint and the First and Second Claims of the Lilco complaint). A common law claim against defendant Standard Oil Company of California (Socal) seeking recovery for the same injuries asserted in the antitrust claims was not involved in the motion and continues to pend below (Second Claim of the Con Edison complaint and Third Claim of the Lilco complaint).

The essence of this case may be briefly stated: Plaintiffs, as purchasers of low sulphur *residual fuel* oil in the United States from a non-defendant independent refiner, New England Petroleum Corporation (Nepco), complain of the efforts of the various defendants to resist confiscation of their *crude* oil properties by Libya and by other members of the Organization of Petroleum Exporting Countries (OPEC) in the Persian Gulf. The injury for which plaintiffs seek recovery stems from the increased residual fuel prices their supplier, Nepco, sought and obtained from plaintiffs after September, 1973 in contravention of their preexisting agreements with Nepco. Nepco purported to justify these fuel price increases on the basis of higher crude oil prices it was charged by the Libyan Government as part of OPEC-wide price increases. (Prior to September, 1973, Nepco had purchased substantially all of Socal's Libyan crude oil. After Libya seized 51% of the crude oil interests of Socal in September, 1973, deliveries to Nepco were suspended by Socal and Nepco commenced purchasing these supplies from the Libyan Government directly). Plaintiffs do not claim that Nepco's or Libya's

prices were set by defendants; they contend merely that the situation might somehow have been different if defendants had not been adamant in resisting the Libyan takeover in trying to forestall similar takeovers in the Persian Gulf.

The District Court held, first:

> "The complaint shows on its face that if there were a conspiracy to violate the antitrust laws the target was not plaintiff but Libya or the Persian Gulf states or all of them. Plaintiff has no standing to sue" (A174).*

In addition, it held there was an independently sufficient ground compelling dismissal:

> "Assuming that Lilco has standing to sue, the complaint shows that it has not been injured 'by reason of' any antitrust violations.
>
> * * *
>
> "The complaint makes it clear that the cause of Lilco's injury (if any) was the increase by Nepco of its prices, an increase which Lilco says was an unjustified breach of contract and for which Lilco is suing [Nepco]. If Nepco's price increase was justified under the contract, then the justification was the increase by Libya of the purchase price to Nepco, an increase which was decided upon by Libya, a sovereign state over which defendants have no control. In any event, therefore, no 'causal connection', either 'clear' or otherwise, is shown between the claimed violations of defendants and the claimed injuries of Lilco" (A174-75).

These conclusions of the court below, however much plaintiffs seek to distort and obfuscate them, are eminently correct and compel affirmance.

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* References to "A" are to the Joint Appendix.

Statement of the Case

The District Court made clear that its "decision of the present motion is based solely on the complaint" (A166a). Accordingly, the following discussion of the facts is confined to the complaints and assumes the truth of their factual allegations.

A. The Parties

Both Con Edison and Lilco are public utilities which generate and distribute electricity for consumption in the State of New York (A3, 26). For purposes of generating electricity, each purchases low sulphur residual fuel oil, which is produced by refining low sulphur crude oil (A7, 30). Neither plaintiff is engaged in any phase of the oil business. Their only relation to that business is as purchasers of petroleum products.

The defendants are three oil corporations and certain of their subsidiaries.* These corporations are engaged in exploration for, and production, transportation, refining, distribution and marketing of petroleum and petroleum products (A4-5, 27-28). The Libyan Arab Republic (Libya) had granted to each of these corporations or to their subsidiaries or affiliates, oil concessions within its territory. From these concessions low sulphur crude oil was produced, some of which was thereafter refined by Nepco into a range of petroleum products, including low sulphur residual oil of

* Chevron Oil Trading Company is a wholly-owned subsidiary of Socal. Texaco Overseas Petroleum Company is a wholly-owned subsidiary of Texaco (A4, 5, 27, 28).

the quality used by Con Edison and Lilco. The complaints do not allege that the plaintiffs were crude or residual oil customers of the defendants. Rather, they allege that plaintiffs purchased substantial quantities of low sulphur residual oil from Nepco (A9, 32).

B. Other Persons Referred to in the Complaints

In addition to the parties, the complaints are concerned with the actions of other entities. Nepco, which is alleged to be a major low sulphur residual oil supplier of Con Edison and the sole such supplier of Lilco (A9, 32), is one of the largest independent importers, refiners and distributors of petroleum oil products in the United States (A6, 29). It has had business relations with the plaintiffs covering a long period of time (A9, 32).

The Libyan National Oil Company (NOC) is the Libyan government-owned oil corporation (A7, 30). It is alleged to have become the owner of 51% of the interests of Socal, Texaco and Mobil in Libya after the nationalization of such interests on September 1, 1973 by the Libyan Government (A12-13, 35-36).

Arabian-American Oil Company (Aramco) is a company jointly owned by Socal, Texaco, Mobil, Exxon Corporation and the Government of Saudi Arabia. It is engaged in the production, refining and transportation of crude oil produced in the territory of Saudi Arabia, a Persian Gulf state (A6, 29).

American Overseas Petroleum Limited (Amoseas) is a company jointly owned by Socal and Texaco which was

engaged in crude oil drilling and producing in Libya (A5, 28).

OPEC is an organization of the countries which account for the bulk of the known crude oil reserves in the world. All major Persian Gulf and North African crude oil producing countries, including Libya and Saudi Arabia, are members (A7, 30).

The London Policy Group (LPG) is a group of the major free world oil companies with interests in OPEC countries formed in January, 1971 "to plan policy with respect to and to bargain jointly with the OPEC countries" (A10, 33).

C. The Complaints' Factual Allegations of Wrongdoing

The First Claim of each complaint is substantially identical and the Court below focused, with the concurrence of all parties, upon the factual allegations of the Lilco complaint* (A111-12, 166a-71). In the interest of completeness, however, both complaints are referred to herein.

Since 1960, Nepco has been Lilco's sole supplier of its residual oil requirements (A9), and it has been a major supplier of Con Edison since 1963 (A32). The agreements in force between Nepco and each plaintiff extended through March, 1980 (A9, 32), established certain maximum prices for the products to be supplied and provided specific payment terms (*id.*). Nepco, in turn, had a long-term contract with Socal providing for its purchase of substantially

* These factual allegations were incorporated by reference into Lilco's Second Claim and constitute the non-conclusory allegations of such claim (A19-21).

all of Socal's share of Amoseas' Libyan crude oil output and for Socal's delivery of such crude to Nepco's refinery (A10, 32-33). Socal was Nepco's primary supplier of low sulphur crude oil (*id.*).

In January, 1971, the defendants and other free world oil companies formed LPG to plan for negotiations with the OPEC countries. They agreed to present a common front and that if an OPEC country nationalized one company's oil reserves, the other LPG members would endeavor to make up the losses (A10-11, 33). This joint approach subsequently broke down, however, when a split developed between those LPG members whose primary interests were in the Persian Gulf and others whose primary interests were in Libya (A11, 33-34). Thus, in August, 1973, when Libya demanded 51% of the oil companies' rights under their concession agreements in that country, the latter group acquiesced but the former group, including defendants, did not (A11-12, 34-35). The complaints are premised on the view that this refusal to acquiesce in Libya's demands constitutes a violation of the United States antitrust laws. Its purpose is alleged to have been the following:

> "In their judgment * * * a grant of a 51% interest in their Libyan holdings would have jeopardized their far more vast and more valuable holdings in the Persian Gulf area, where they had succeeded in negotiating much more favorable agreements, including that with the Government of Saudi Arabia for a 25% participation in Aramco. Accordingly, Socal, Texaco, Mobil and other major LPG members concertedly decided to reject and did reject this proposal of the Libyan Government" (A11-12, 34-35).

Thereupon, on September 1, 1973, Libya announced the nationalization of 51% of the defendants' Libyan interests without their acquiescence (A12, 35) and, on "September 10, 1973, Socal informed Nepco that the Libyan Government had seized 51% of Socal's interest in Amoseas, that Socal was resisting this takeover, and that as of September 1, 1973, all deliveries of Libyan crude oil by Socal were suspended" (*id.*).

Nepco claimed that this "would violate Socal's contractual obligations to Nepco" and urged Socal to accede to the Libyan demands and not suspend such deliveries but Socal stood firm (A12-13, 35-36). Socal acted as it did, according to the complaints, for the following reasons:

> "These actions, taken in accord with agreements made among certain LPG members, were designed to protect Socal's and Texaco's interests in the Persian Gulf, including their interests in Aramco" (A13, 36).

Thereupon, at the alleged invitation of the Libyan Government, Nepco entered into a purchase agreement with the Libyan Government's National Oil Company (A13, 36) and advised plaintiffs thereof within two days of Socal's announcement of suspension of deliveries (A16, 39).

> "* * * Nepco entered into an agreement with NOC for purchase in Libya of the approximate quantity of low sulphur crude oil that Socal previously had been supplying" (A13, 36).

The complaints next allege that defendants "embarked on a course of action designed to prevent Nepco from dealing with the Libyan Government, from purchasing low

sulphur crude oil from NOC, from transporting such low sulphur crude oil, from refining it and from distributing it to its customers, including [plaintiffs]" (A13-14, 36). In particular, the "course of action" is alleged to have consisted of (a) threats against Nepco (A14, ¶¶38-40; A37, ¶¶37-39), which Nepco disregarded (A14, ¶41; A37, ¶40) and (b) lawsuits against Nepco (A14-15, ¶¶42-45; A37-38, ¶¶41-44), which were similarly ineffectual:

> "Despite the efforts of Socal, Texaco and Mobil, Nepco succeeded in bring [sic] the Libyan oil into the United States and supplying its customers, including Lilco" (A15). *Cf.* A38.

In addition, the "course of action" is expressly alleged to have had a single objective. The complaints aver that it was undertaken by defendants

> "* * * pursuant to an unlawful conspiracy whose object was to protect their monopoly interest in and virtually complete control over all aspects of the production, transportation, refining and marketing of crude oil in the Persian Gulf area" (A13, 36).

There are no factual allegations of any other purportedly wrongful conduct by defendants. Nor do plaintiffs claim, either in the complaints or elsewhere, that the situation in the Persian Gulf—where the anticompetitive effects ostensibly were occurring—had anything to do with them.*

* The complaints' only effort to connect the purportedly unlawful conspiracy to the plaintiffs consists of a bare conclusory statement (which not only is not supported by factual averments but is contradicted by them) that defendants conspired to monopolize and have monopolized trade and commerce in low sulphur oil to be imported into the East Coast of the United States (A8, 31). Their factual allegations complain of the opposite—not monopolization but *withdrawal* from this business to protect a different alleged monopoly in the Persian Gulf.

D. The Alleged Injury

The purported "injury" to plaintiffs upon which they predicate their actions is that Nepco, subsequent to September 1, 1973, increased the prices it charged the plaintiffs for low sulphur residual oil above the prices provided for in their contracts and imposed different payment terms than theretofore (A13, 36).* Plaintiffs allege that Nepco's decision to alter its arrangements with plaintiffs was due to the fact that NOC's prices and terms to Nepco were less favorable than Socal's had been prior to the Libyan nationalization. Plaintiffs allege that the increases in the direct and indirect costs of low sulphur crude oil to Nepco "led Nepco to seek to increase the price that Nepco charged" Lilco and Con Edison "for low sulphur residual oil" (A16, 39).

Plaintiffs claim to have been injured by reason of these changes in prices and terms in their purchase arrangements with Nepco (which were different for each plaintiff), although acknowledging the automatic passing-on of fuel price increases to their customers (A18, 40-41).

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* While not mentioned in their complaints, plaintiffs conceded that the District Court could take judicial notice of Lilco's complaint against Nepco pending in the Supreme Court of New York in which Lilco charges Nepco's increased prices violated its contract with plaintiff and where it seeks to recover the same damages sought in this action (A150). Should Lilco prevail there, the claimed "injury" upon which it predicated this litigation will have disappeared (A171). The issue in that suit, according to Appellants' Brief (App. Br.), is whether Nepco should be relieved "from the contract's maximum price limitations" under the *force majeure* clause, with Lilco claiming that Nepco should not be so relieved (App. Br. 10n). Lilco's complaint against Nepco is an exhibit to "Defendants' Memorandum in Support of Motion to Dismiss Antitrust Claims" in the Lilco Record on Appeal.

E. The Motions to Dismiss the Antitrust Claims

Three motions to dismiss the antitrust claims were before the District Court: one, by Socal, involved the applicability of the United States antitrust laws to dealings with foreign governments acting in their sovereign capacity; another, by Mobil, raised a similar issue, as well as other issues involving the Act of State doctrine and the right to protect property against illegal seizure. The third motion, jointly brought by all defendants (and upon which the District Court premised its decision), asserted that the material allegations of fact disclosed on their face that plaintiffs were not the target of the purported antitrust wrongdoing and that any injury plaintiffs may have sustained was indirect, far removed from defendants' allegedly illegal objective and not legally attributable to defendants.

On the return date of the motions, Judge Wyatt suggested that the joint motion might be treated first because it involved only the face of the complaints and its disposition could moot the others (A108-09). The Court explained:

> "No affidavits are needed and certainly under the rule, they can be excluded. I therefore propose to exclude them and to consider the face of the complaint. Before I adopt this procedure, I want to give counsel a chance to be heard on the subject. Are there any objections or comments?" (A109).

Plaintiffs' counsel expressly advised that they had no objection so long as the Court decided the joint motion promptly (A110-11)—a request to which Judge Wyatt assented and with which he complied.*

* Plaintiffs now would imply some impropriety in the Court's rendering its decision promptly (App. Br. 2) and limiting it to the face of the complaints (*id.* at 4-5).

The Court next suggested that, in the interest of simplicity, it might confine argument of the joint motion "and in writing any memorandum disposing of it" to the first claim in the Lilco complaint (A111-12), since

> "the decision on the points raised by the joint motion as to this first claim in the Lilco complaint will necessarily govern as to the second claim in that same complaint and as to the first claim in the Con Ed complaint" (A112).

Again, the Court made clear that its proposal was subject to the consent of the parties:

> "Before I adopt that procedure, though, I will give counsel a chance to make any objections or comments. What do counsel say about that?
>
> "Mr. Handler: No objection, your Honor.
>
> "The Court: Anybody have any objection to that?" (A112).

None was voiced. Despite the ample opportunity to advise Judge Wyatt of any ground for different treatment of Lilco's Second Claim,* plaintiffs elected to acquiesce in having its disposition depend upon the determination of the First Claim.**

F. The Decision Below

At the oral argument, plaintiffs acknowledged that the conclusory allegations in their complaints that defendants conspired to monopolize and monopolized trade and com-

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* No such claim is made in the Con Edison complaint.

** As previously noted, the factual averments of the First Claim are realleged by reference in the Second and make up its non-conclusory allegations. Plaintiffs' current attempt to assert that it was erroneous for the Court to so proceed (App. Br. 12) is in all events baseless. *See* pp. 40-41n, *infra*.

merce in low sulphur oil to be imported into the United States (A8, 31) in fact meant precisely the opposite—*i.e.*, that they ceased to deal in such oil (A143-44). Rather than monopolization of any such market, plaintiffs explained, their real theory of wrongdoing was that defendants withdrew from Libya when that country took 51% of their oil without their consent (A138, 146) and that defendants subsequently tried unsuccessfully to get Libya to back away from its seizure of their property. According to plaintiffs, what made this a matter of antitrust concern was that defendants' conduct toward Libya was motivated by the desire to preserve from expropriation defendants' so-called "monopoly" interests in other kinds of crude oil in the Persian Gulf.

When the Court inquired—

> "What was the object of the conspiracy? To get Lilco and Con Ed?" (A145),

plaintiffs responded:

> "The object of the conspiracy as it came into full flower in mid-September or early September, 1973, was for the purpose of protecting its interest in the Persian Gulf, to boycott and to refuse to lift Libyan oil" (*id.*).

Plaintiffs explained that defendants were "willing to risk the losses" in Libya "because they had more fish to fry elsewhere in the world" (A144)—in the Persian Gulf:

> "* * * they were determined to boycott, your Honor, and the reason they were determined to boycott was because nothing was more important to them than protecting their interest in the Persian Gulf and the east coast went by the boards" (A142).

While Libya, according to plaintiffs, was important to the East Coast of the United States because of its low sulphur crude oil, "the Persian Gulf was the only thing on the minds of the defendants" (A141).

The oral argument thus confirmed what the factual allegations of the complaints made clear—that plaintiff utilities patently were not at the heart of the claimed antitrust violations. The District Court correctly observed that under the law governing standing to sue for treble damages under § 4 of the Clayton Act, a plaintiff " 'must be within the "target area" of the alleged antitrust conspiracy, *i.e.*, a person against whom the conspiracy was aimed. * * *' " (A173). Here, however, the Court unavoidably concluded:

> "The complaint shows on its face that if there were a conspiracy to violate the antitrust laws the target was not plaintiff but Libya or the Persian Gulf states or all of them. Plaintiff has no standing to sue" (A174).

The Court further found, as an independent basis for dismissal, that "there was no causal connection between the claimed antitrust violations and the claimed injuries of plaintiffs (*id.*)—injuries which flowed from conduct by Nepco and Libya that was not the necessary consequence of the violations' alleged anticompetitive impact.

The District Court also observed that the purported anticompetitive effects of such violations related to the Persian Gulf area, while there was no claim that anything having to do with that area affected plaintiffs (A175).

Defendants' joint motion had presented two further independently sufficient legal barriers precluding plaintiffs from satisfying the proximate cause requirements of a

private treble damage action: the intervention of a governmental act* and the "pass-on" doctrine.** However, the District Court did not reach these grounds:

> "In view of the conclusions reached, these arguments—while substantial—need not be considered" (A176).

As the District Court relied upon neither of these bases in reaching its decision, they are not developed on this appeal although they constitute independent grounds supporting the District Court's judgment of dismissal.

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* Had defendants deliberately induced the Libyan Government, fraudulently or otherwise, to set its high oil prices, plaintiffs could not bring suit to recover thereon. *E.g.* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964); United Mine Workers of America v. Pennington, 381 U.S. 657, 671 (1965); Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92, 110 (C.D. Cal. 1971), *aff'd per curiam*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972). *A fortiori*, defendants may not be sued for injuries caused by Libyan Government prices for which they were *not* responsible.

** For purposes of this legal impediment, it was assumed *arguendo* that defendants could somehow be found responsible for Libya's "overcharges" to Nepco for crude oil. The existing contracts between Nepco and plaintiffs did not require the passing-on of such "overcharges" to plaintiffs (A9, 32). Nepco purchased crude oil from sources other than Libya and refined it all into a variety of petroleum products in addition to the low sulphur residual fuel oil purchased by plaintiffs. Under these circumstances, if anyone could sue for Libya's crude oil "overcharges," it would be the direct purchaser of that raw material, Nepco, rather than the remote purchasers of the end product, the plaintiffs. *E.g.* Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968); Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390 (1906); Donson Stores, Inc. v. American Bakeries Co., 58 F.R.D. 481 (S.D.N.Y. 1973); United Egg Producers v. Bauer Int'l Corp., 312 F. Supp. 319 (S.D.N.Y. 1970); Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., 50 F.R.D. 13 (E.D. Pa. 1970), *aff'd per curiam sub nom.*, Mangano v. American Radiator & Standard Sanitary Corp., 438 F.2d 1187 (3d Cir. 1971); Stern v. Lucy Webb Hayes Nat'l Training School, 367 F.Supp. 536 (D.D.C. 1973). Plaintiffs, on the other hand, may well have had a preexisting arrangement for the automatic passing-on of increased fuel costs, which could further preclude their maintenance of this suit. *E.g.* National Auto Brokers Corp. v. General Motors Corp., 376 F. Supp. 620, 632 (S.D.N.Y. 1974).

G. The Present Appeal

Unable to frontally assail the conclusions upon which the District Court grounded its dismissal of the antitrust claims, plaintiffs invent other conclusions, impute them to Judge Wyatt and find them wanting. They assert new charges which their pleadings belie and accuse Judge Wyatt of failing to consider purported factual allegations which are nowhere to be found in the complaints. And they otherwise distort his statements and make entirely unwarranted attacks upon him.*

Central to their appeal is their claim that

> "* * * the Court appears to have misunderstood the nature of these cases. Its opinion starts with an *inaccurate* and *misleading* summary of the facts of the complaints" (App. Br. 13; emphasis supplied).

While one might reasonably expect this serious charge to be followed by a pin-pointing of the claimed inaccuracies, plaintiffs' brief offers none. As a comparison of the complaints with the Court's summary in its opinion (A167-71) makes evident, the summary is a completely fair one and the purported inaccuracies simply do not exist.

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* Thus, for example, Judge Wyatt had occasion to express curiosity during oral argument at plaintiffs' apparent opposition to any efforts to combat OPEC (A122-23). Although plaintiffs know precisely to what the Court was referring—the 1974 Annual Report of plaintiff Con Edison itself complains about having "hanging over them, *at the whim of the OPEC cartel*, the possibility of arbitrary fuel price increases and of fuel supply interruptions" (p. 4; emphasis supplied)—plaintiffs use the remark to characterize Judge Wyatt as apparently "bewildered" and approving of "illegal boycotts" (App. Br. 14).

Plaintiffs further assert that the Court's "basic misreading of the complaints" (App. Br. 15) is due to its failure to realize that the defendants purportedly jointly agreed that no one would take crude oil from its "unchallenged, unaffected 49% interests in Libya" (*id.*). Plaintiffs term this a "crucial fact, conspicuously absent from the Court's recitation of the facts" (*id.* at 37) and represent that it is charged in the complaints (*id.* at 14-15). They refer to no paragraph or page of either complaint, however, because no such allegation is to be found there.* This holds true with respect to each matter they accuse the Court of disregarding. The Court's "basic misreading of the complaints" (*id.* at 15) thus consists simply of its reading exactly what they happen to contain.**

Defendants respectfully submit that it was entirely proper for the Court to dispose of a motion addressed to the complaints on the basis of the particular contents of those complaints.† The Court was further correct in determining that on the face of the complaints, plaintiffs are not the object of the claimed antitrust violation and their asserted injury was not its proximate result. The complaints would still be defective even if they had contained allegations which are not to be found within their four corners since the extrinsic assertions do not in any significant way alter the substance of the pleadings, cure their defects or overcome their legal insufficiency.

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* Its omission may relate to the fact that it is disavowed by plaintiffs' own exhibit (A68).

** Plaintiffs adopt a different approach for themselves. Their brief's "summary of the facts pleaded in the complaints" (App. Br. 5) concededly contains "facts" that are outside the complaints (*id.*) and does not differentiate between them.

† Needless to say, we are not dealing with the pleadings of ***pro se*** plaintiffs but with those of skilled and knowledgeable counsel.

ARGUMENT

I

Plaintiffs were not the "target" of the claimed violations and lack standing to sue.

A. The Governing Principles

Section 4 of the Clayton Act (15 U.S.C. § 15) provides that treble damages may be recovered only by a person who is "injured in his business or property by reason of anything forbidden in the antitrust laws * * *." As this Court has repeatedly made emphatically clear, the statutory requirement that the injury be "by reason of" the alleged violation restricts the right to sue to those persons at whom the unlawful conduct is directed and whose injury flows directly from the infraction. Consequently, persons whose injury is "remote," "consequential" or "incidental," who sustained injury by reason of their relationship to an intermediate antitrust victim or who were not directly injured by the lessening of competition or breakdown of competitive conditions at the level of the economy where the violation purportedly had its anticompetitive impact, are outside the "target area" of the violation, lack standing to sue and may not recover.

The controlling legal principle was described in *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972), as follows:

> "In a series of decisions over the last 15 years, in all of which certiorari was denied by the Supreme Court, this court has committed itself to the principle that in order to have 'standing' to sue for treble dam-

> ages under § 4 of the Clayton Act, a person must be within the 'target area' of the alleged antitrust conspiracy, i.e., a person against whom the conspiracy was aimed, such as a competitor of the persons sued. *Accordingly we have drawn a line excluding those who have suffered economic damage by virtue of their relationships with 'targets' or with participants in an alleged antitrust conspiracy, rather than by being 'targets' themselves''* (emphasis supplied).

This rule has been reaffirmed by this Court at least six times in the last five years.* It has been applied to dismiss actions by a variety of persons who, like plaintiffs here, alleged they were injured as the result of antitrust violations aimed at and directly affecting others.**

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* Nassau County Ass'n of Ins. Agents, Inc. v. Aetna Life & Cas. Co., 497 F.2d 1151 (2d Cir.), *cert. denied,* 419 U.S. 968 (1974); GAF Corp. v. Circle Floor Co., 463 F.2d 752 (2d Cir. 1972), *cert. dismissed,* 413 U.S. 901 (1973); Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292 (2d Cir. 1971), *cert. denied,* 406 U.S. 930 (1972); Fields Prods., Inc. v. United Artists Corp., 432 F.2d 1010 (2d Cir. 1970), *aff'g* 318 F. Supp. 87 (S.D. N.Y. 1969), *cert. denied,* 401 U.S. 949 (1971); Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183 (2d Cir. 1970), *cert. denied,* 401 U.S. 923 (1971); SCM Corp. v. Radio Corp. of America, 407 F.2d 166 (2d Cir.), *cert. denied,* 395 U.S. 943 (1969). *See also* Raubal v. Engelhard Minerals & Chem. Corp., 364 F. Supp. 1352 (S.D.N.Y. 1973); Kemp Pontiac-Cadillac, Inc. v. Hartford Auto. Dealers' Ass'n, 380 F. Supp. 1382 (D. Conn. 1974).

** *Suppliers*: Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183 (2d Cir. 1970), *cert. denied,* 401 U.S. 923 (1971). *Stockholders*: Bookout v. Schine Chain Theatres, Inc., 253 F.2d 292 (2d Cir. 1958). *Employees*: Westmoreland Asbestos Co. v. Johns-Manville Corp., 113 F.2d 114 (2d Cir. 1940), *aff'g* 30 F. Supp. 389, 391 (S.D.N.Y. 1939). *See also* Hans Hansen Welding Co. v. American Ship Bldg. Co., 1973 Trade Cas. ¶74,739 (S.D.N.Y. 1973); Walder v. Paramount Publix Corp., 132 F. Supp. 912 (S.D.N.Y. 1955); Bywater v. Matshushita Elec. Indus. Co., 1971 Trade Cas. ¶73,759 (S.D. N.Y. 1971); Westmoreland Asbestos Co. v. Johns-Manville Corp., *supra. Landlords*: Westmoreland Asbestos Co. v. Johns-Manville Corp., *supra;* Lieberthal v. North Country Lanes, Inc., 221 F. Supp.

(footnote continued on next page)

Thus, in *Billy Baxter, Inc.* v. *Coca-Cola Co.*, 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 925 (1971), this Court denied standing to a company which franchised bottlers to market its trademarked soft drinks and sold the necessary extracts to its franchisees. The franchisor alleged that its business was damaged as a result of a conspiracy between Coca-Cola and Canada Dry to deny its franchisees access to retail outlets. Despite the fact that Coca-Cola and Canada Dry knew their actions would inevitably deprive the plaintiff of business, the Court held that the supplier-franchisor's connection with the actual marketing of its trademarked beverages by others was not "sufficiently compelling to support a treble damage suit" by it (431 F.2d at 189). Looking to the essence of Section 4's requirement that injury be "by reason of" an antitrust violation, the Court ruled:

> "* * * this [causal] connection must also link a specific form of illegal act to a plaintiff engaged in the sort of legitimate activities which the prohibition of this type of violation was clearly intended to protect. *While any antitrust violation disrupts the competitive economy to some extent and creates entirely foreseeable ripples of injury which may be shown to reach individual employees, stockholders, or consumers,* it

685, 690 (S.D.N.Y. 1963), *aff'd*, 332 F.2d 269 (2d Cir. 1964). *Franchisors*: Billy Baxter, Inc. v. Coca-Cola Co., *supra*. *Licensors*: Productive Inventions, Inc. v. Trico Products Corp., 224 F.2d 678, 679 (2d Cir. 1955), *cert. denied*, 350 U.S. 936 (1956). *See also* Western Geophysical Co. v. Bolt Associates, Inc., 1972 Trade Cas. ¶73,872 (D. Conn.), *appeal dismissed*, 463 F.2d 101 (2d Cir.), *cert. denied*, 409 U.S. 1040 (1972). *Consumers*: Donson Stores, Inc. v. American Bakeries Co., 58 F.R.D. 481 (S.D.N.Y. 1973); United Egg Producers v. Bauer Int'l Corp., 312 F. Supp. 319 (S.D. N.Y. 1970). *See also* Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 315 F.2d 564 (7th Cir.), *cert. denied*, 375 U.S. 834 (1963); Stern v. Lucy Webb Hayes Nat'l Training School, 367 F. Supp. 536 (D.D.C. 1973).

> has long been held that not all of these have the requisite standing to sue for treble damages * * *. *Consequently, a plaintiff must allege a causative link to his injury which is 'direct' rather than 'incidental' or which indicates that his business or property was in the 'target area' of the defendant's illegal act''* (431 F.2d at 187; emphasis supplied).

Thereafter, in *Fields Prods., Inc.* v. *United Artists Corp.*, 432 F.2d 1010 (2d Cir. 1970), *aff'g* 318 F. Supp. 87 (S.D. N.Y. 1969), *cert. denied*, 401 U.S. 949 (1971), this Court affirmed *per curiam* a decision denying standing to a producer of motion pictures which alleged that its income, derived from the defendant-distributor (to whom it supplied films), was diminished as a result of the distributor's unlawful block-booking of sales to its customers.

Again, in *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc., supra*, standing was denied to a landlord of theatres who alleged that the percentage rental payments it received were lower than they would have been in the absence of a conspiracy between its tenant and various motion picture distributors and exhibitors which required the tenant to exhibit pictures inferior to those which would have been exhibited under normal competitive conditions. This Court denied standing, notwithstanding the immediate and foreseeable injury to plaintiff, because the anticompetitive object of the alleged conspiracy among distributors and exhibitors "was to restrain competition in the exhibition of motion pictures," and it was "not aimed at plaintiff [(a landlord)], but at competing distributors and exhibitors" (454 F.2d at 1296).

This Court's *Calderone* opinion not only states the applicable principle, but explains its rationale:

> "The rationale behind the foregoing demarcation is simple, fair and reasonable * * *. It acknowledges that while many remotely situated persons may suffer damage in some degree as the result of an antitrust violation, their damage is usually much more speculative and difficult to prove than that of a competitor who is an immediate victim of the violation. Furthermore if the flood-gates were opened to permit treble damage suits by every creditor, stockholder, employee, subcontractor, or supplier of goods and services that might be affected, the lure of a treble recovery * * * would result in an over-kill, due to an enlargement of the private weapon to a caliber far exceeding that contemplated by Congress * * *.[*]
>
> "* * * A line which limits standing to those against whom the antitrust violation is directed fulfills Congress' fundamental purpose and at the same time establishes a reasonable and easily identifiable cut-off that avoids the unfortunate consequences of opening the flood-gate to all, no matter how remote their interest or incidental their relationship" (454 F.2d at 1295-96).

These controlling principles were again applied several months ago in *Nassau County Ass'n of Ins. Agents, Inc.* v. *Aetna Life & Cas. Co.*, 497 F.2d 1151 (2d Cir.), *cert. denied*, 419 U.S. 968 (1974). As in the instant case, the standing issue came before the Court on a motion to dismiss pursuant to Rule 12. The action had been brought by

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* This was illustrated in Bywater v. Matshushita Elec. Indus. Co., 1971 Trade Cas. ¶73,759, at 91,203 (S.D.N.Y. 1971):

> "If the unions are permitted to sue because they have lost dues because the employees have lost their jobs, it is hard to see why a grocer, for example, could not sue on the theory that he has sold less food to the employees because they have less money because their employer has been injured. To relax the requirement of standing to this extent would, as a practical matter, abolish it entirely."

four insurance trade associations on behalf of their members and other described alleged classes comprising independent insurance agents and insurance policyholders. The complaint essentially charged that terminations of insurance agents for certain specified reasons violated the antitrust laws. Quoting from *Billy Baxter* and *Calderone,* the District Court applied the "clear" law of this Circuit and dismissed the complaint on the ground that the plaintiffs lacked standing because they were not in the "target area" of the alleged wrongful conduct and any injury to them was "indirect at best" (361 F. Supp. at 969-70). *See also Nassau County Ass'n of Ins. Agents, Inc.* v. *Aetna Cas. & Sur. Co.,* 345 F. Supp. 645, 649 (S.D.N.Y. 1972).

Affirming the District Court's decision, this Court held that the alleged injury—a decrease in membership and dues —was "too remote" to confer standing because plaintiffs "neither do business with the defendant insurance companies nor compete with them" (497 F.2d at 1153)—a holding squarely applicable here.

B. The Material Factual Allegations of the Complaints Preclude Finding that Plaintiffs Were the "Target" of the Alleged Violations.

As the foregoing discussion indicates, this Court has long recognized that any antitrust violation can produce far-reaching ripples of injury. For the reasons described, however, the Court has determined that at least two categories of claimed victims may not bring suit under § 4 of the Clayton Act:

a. Those whose losses were caused by their relationship to an intermediate antitrust victim; and

b. Those who are not themselves the "target" or "object" of the antitrust violation.

The District Court found it unnecessary to reach the question of whether plaintiffs' relationship to Nepco precludes suit by them as derivative claimants since the complaints make it unmistakably clear that in all events they were far removed from the object of the alleged conspiracy.

Each and every "wrongful" act is expressly alleged in the complaints to have been done with the single objective of preserving defendants' "monopoly" position in the Persian Gulf (pp. 6-9, *supra*)—an objective plaintiffs do not claim has anything whatever to do with them. There could be no clearer case of a claimant being outside the target area.

True, in an effort to supply some colorable connection between themselves and their complaints, plaintiffs inserted a bare conclusory allegation near the beginning of their complaints asserting that defendants conspired to monopolize and have monopolized trade and commerce in low sulphur oil to be imported into the East Coast of the United States (A8, 31). Not only are there no factual allegations supporting this conclusory claim but, as previously shown, the factual allegations attribute every claimed wrongful act solely to the specific conspiratorial "object" (A13, 36) of protecting defendants' alleged monopoly interest in the Persian Gulf (pp. 6-9, *supra*). And, as noted above, plaintiffs acknowledged at oral argument that their claims do not emanate from any purported control by defendants of low sulphur oil to be imported into the East Coast but rather from their relinquishing their Libyan oil business to others —Libya and independents (pp. 12-14, *supra*). The District

Court's ruling that this general conclusory averment could not convey a standing to plaintiffs to which they were otherwise not entitled is beyond dispute.*

Nor are any of plaintiffs' other attempts to overcome their fundamental standing disability any the less futile.

1. The "Competitor" and "Privity" Strawmen

The District Court, in analyzing the relationship of plaintiffs to the alleged violation, observed:

> "Plaintiff is not a competitor of defendants nor has it ever bought any of their products. Plaintiff is a customer of a former customer of one of the defendants" (A171-72).

On the basis of these two sentences which they quote, plaintiffs claim that the District Court was creating two new erroneous standing rules: that only a competitor may sue and that only someone in privity may sue (App. Br. 23-25). The District Court patently did no such thing. Had Judge Wyatt believed that only a competitor may sue, he would hardly have found it necessary to explore other possible aspects of plaintiffs' relationship to the defendants

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* *E.g.* McCleneghan v. Union Stock Yards Co., 298 F.2d 659, 662-63 (8th Cir. 1962); Pauling v. McElroy, 278 F.2d 252, 253-54 (D.C. Cir.), *cert. denied*, 364 U.S. 835 (1960); Cole v. Cardoza, 441 F.2d 1337, 1342 (6th Cir. 1971); Oppenheim v. Sterling, 368 F.2d 516, 519 (10th Cir. 1966), *cert. denied*, 386 U.S. 1011 (1967); Hiland Dairy, Inc. v. Kroger Co., 402 F.2d 968, 973 (8th Cir. 1968), *cert. denied*, 395 U.S. 961 (1969); Wise v. Chicago, 308 F.2d 364, 366 (7th Cir. 1962), *cert. denied*, 372 U.S. 944 (1963); Barnett v. Anaconda Co., 238 F. Supp. 766, 773 (S.D.N.Y. 1965); John & Sal's Automotive Service, Inc. v. Sinclair Refining Co., 177 F. Supp. 201, 203 (S.D.N.Y. 1959); Cooper Agency, Inc. v. McLeod, 235 F. Supp. 276, 281 (E.D.S.C. 1964), *aff'd*, 348 F.2d 919 (4th Cir. 1965). *See also* SCM Corp. v. Radio Corp. of America, 276 F. Supp. 373, 376-77 (S.D.N.Y. 1967), *aff'd*, 407 F.2d 166, 169-70 (2d Cir.), *cert. denied*, 395 U.S. 943 (1969).

and the claimed wrongdoing. Similarly, had he believed privity to be the sole determinant, the matter of competition with defendants would have been superfluous.* What Judge Wyatt did is precisely what his opinion plainly indicates—conscientiously apply this Circuit's principles of standing as they were specified in *Calderone* to the material factual allegations of the complaints.

2. *The Foreseeable Injury Strawman*

While acknowledging the existence of a target area rule, plaintiffs suggest that it is sufficient to overcome this limitation to show that injury to the plaintiffs was foreseeable or within defendants' knowledge and they contend that such was the situation here (App. Br., *e.g.*, 10, 21, 25, 27, 29, 37). Putting aside the question of whether a foreseeability test could be satisfied in light of the intervening independent acts of Libya and Nepco, the fact of the matter is that *Calderone* dispositively rejected such a test.** The Court could not have been more emphatic:

> "Despite our dissenting brother's suggestion that the 'target area' standard is vague and confusing, we find it to possess the virtue of definiteness. In simple terms a 'target' is a person or business against which competitive aim is taken. The line is clearly drawn by requiring that to have standing one must be an object of an antitrust conspiracy. In contrast, the 'foreseeability' test urged by the dissent would permit anyone to sue, regardless of how distant his interest or rela-

* Of course, as *Calderone* made clear, privity alone will not suffice to convey standing; nor, indeed, will status as a competitor. *E.g.* Kemp Pontiac-Cadillac, Inc. v. Hartford Auto Dealers' Ass'n, 380 F. Supp. 1382 (D. Conn. 1974); Boston Pneumatics, Inc. v. Ingersoll-Rand, 65 F.R.D. 61 (E.D. Pa. 1974).

** It was also rejected in *Billy Baxter, supra,* 431 F.2d at 187.

> tionship (including a customer of a competitor's customer, or a supplier to a supplier dealing with an alleged conspirator), since it would be difficult to disprove the fact that remote economic repercussions in the line of distribution result from almost every antitrust violation" (454 F.2d at 1296 n.2).*

One further aspect of this rationale that is particularly pertinent here was emphasized in *Hans Hanser Welding Co.* v. *American Ship Bldg. Co.*, 1973 Trade Cas. ¶74,739, at 95,239 (S.D.N.Y. 1973):

> "It was felt that a definite cut-off point was needed to limit those who could bring private antitrust actions, especially in view of the fact that, due to the uncertain boundaries of the antitrust laws themselves, it is often difficult to tell in advance what conduct will be found violative of the antitrust laws. Because of this policy, the foreseeability test, under which anyone would have standing if it should have been foreseeable that he would be injured, was rejected."

3. The Intent Strawman

Although the complaints are devoid of any averment that defendants intended to injure Lilco and Con Edison,** plaintiffs now assert that they were the intended targets of defendants' allegedly unlawful conduct (App. Br. 25-

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* In light of this explicit rejection of "foreseeability," plaintiffs' attempt to suggest (App. Br. 21-23) that this Court's citation of two Ninth Circuit decisions in the same *Calderone* opinion (454 F.2d at 1297 n.5) signaled adoption of foreseeability in this Circuit requires no comment.

** The Court below, both at oral argument (A128) and in its written opinion (A168, 172), observed that the complaints did not aver that injury to plaintiffs was an objective of the alleged conspiracy.

28).* Once again, they are grasping at a straw which is of no avail to them. It has long been established in this Court that even well-pleaded allegations of an antitrust defendant's specific intent to injure a plaintiff are insufficient to accord standing and to overcome a motion to dismiss for lack of standing.

For example, in *SCM Corp.* v. *Radio Corp. of America*, 407 F.2d 166 (2d Cir.), *cert. denied*, 395 U.S. 943 (1969), SCM commenced an action to declare invalid a patent on Electrofax machines held by RCA and licensed to SCM and others. RCA interposed a counterclaim alleging that SCM had committed various anticompetitive acts against other RCA licensees (SCM's competitors in the Electrofax manufacturing market) in order to make itself a dominant factor in that market and thereby force RCA to lower its royalties. According to RCA's counterclaim, SCM sought these reduced royalties in order to gain further advantages over its competitors, all with the ultimate aim of confronting RCA with only one licensee, SCM, which could make even further demands on RCA. RCA alleged that when it refused to accede to SCM's demands, SCM terminated its existing license agreement and commenced its declaratory judgment action (Counterclaim ¶67). RCA claimed that it was "immediately injured" (Counterclaim ¶70) and that SCM had "wilfully abused [its] dominant

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* Plaintiffs' only tendered support for their *ipse dixit* assertion that they were the "intended targets" of the antitrust violations is the following (App. Br. 27n):

> "Nepco had informed Socal that the boycott would cause its customers, Lilco and Con Edison, irreparable harm (A71)."

Thus, the "intent" argument seems to be predicated simply upon foreseeability.

position to eliminate RCA's lawful position in the market derived from its patents * * *" (Counterclaim ¶61).

The District Court dismissed the counterclaim because of RCA's lack of standing. On appeal to this Court, RCA claimed that "since SCM's refusal to pay further royalties was an integral part of its scheme of monopolization, RCA was indeed directly injured by the alleged antitrust violations" (RCA's Brief on Appeal, p. 3). In addition, in its Questions Presented, RCA placed the issue of intention squarely before the Second Circuit:

> "1. May a person who is injured in retaliation for his failure to assist in illegal monopolization sue under the antitrust laws to recover those damages?" (*id.* at 12).

Despite RCA's repeated assertions that it was directly injured, that SCM had specifically intended such injury and that SCM's acts were all part of a single scheme to monopolize the Electrofax manufacturing market and confront RCA with only one licensee who would make unfair demands upon it, this Court affirmed the dismissal of RCA's counterclaim. While assuming the factual allegations of the counterclaim to be true, the Court nevertheless held that the victims of SCM's alleged antitrust violations, "the people in the 'target area,'" were SCM's competitors and not RCA (407 F.2d at 169).

In a vigorous dissent, Judge Timbers pointed out that the *SCM* case was distinguishable from several earlier cases cited by the majority because "[i]n not one of these cases was it alleged that the anticompetitive action was taken with the specific aim of harming the plaintiffs" (407 F.2d

at 172). *SCM* thus stands foursquare for the proposition that an allegation of specific intent to injure a plaintiff is insufficient to put that plaintiff within the "target area" of an antitrust violation.

Thereafter, in *Billy Baxter, Inc.* v. *Coca-Cola Co., supra,* the complaint, as the dissent explained, charged that the anticompetitive acts were "to eliminate the Billy Baxter brand-name beverage products from competition with defendants' brand-name beverage products" (431 F.2d at 194) and that "Billy Baxter, therefore, is the principal, and the intended, victim of the defendants' illegal conduct, for the purpose for which defendants conspired was to keep Billy Baxter's trade name beverages off retail shelves; * * *" (*id.* at 195).* The Court of Appeals nevertheless held that Billy Baxter was not the "target" for standing purposes and affirmed the grant of summary judgment for defendants in the face of disputed factual issues with respect to their intent on the ground that intent was irrelevant:

> "Summary judgment was an appropriate remedy in this case, because *the factual questions of motive and intent were not material to the appellant's standing. * * * Assuming the truth of appellant's extensive material factual allegations, they were nevertheless insufficient to show standing to sue*" (*id.* at 189; emphasis supplied).

* The plaintiff there also had moved to amend the complaint to allege that

> "it was the intent and purpose of Coca Cola and Canada Dry that Plaintiff be removed as a competitor of Coca Cola and Canada Dry and that Plaintiff not grow to be a greater competitor of Coca Cola and Canada Dry" (*Billy Baxter* Record, p. 73).

In support of this proposition, the Court cited its earlier decision in *SCM*. Judge Waterman, dissenting in *Billy Baxter*, stressed (as Judge Timbers had done in *SCM*) the defendants' intent to harm the plaintiff (431 F.2d at 195).*

In sum, assertions of defendants' subjective intent to harm them cannot cure plaintiffs' lack of standing.

4. The Unalleged Joint Refusal to Deal With Plaintiffs

Implicitly recognizing that plaintiffs were not the target of the antitrust wrongdoing alleged in the complaints, plaintiffs' brief casually announces a different antitrust claim —a purported joint refusal by defendants to sell residual fuel oil to plaintiffs.** But there is no such claim in these cases.†

The only allegations bearing on this matter in the complaints are the following two sentences:

> "After notification by Nepco of its price increase, Con Edison tried to obtain low sulphur residual oil from

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* *See also* Westmoreland Asbestos Co. v. Johns-Manville Corp., *supra*, affirming the dismissal of a complaint for lack of standing despite extensive allegations in the pleadings of a specific intent to eliminate plaintiff and his corporation from competition in the industries sought to be monopolized.

** Plaintiffs' brief claims that

> "[T]he *complaints go on to allege* that the LPG majors jointly refused to deal with Lilco and Con Edison, first through boycott of Nepco and *ther directly* after solicitation of offers by the utilities (A13-4, 16, 36, 39)" (App. Br. 26; emphasis supplied).

† Nor, of course, would such a claim entitle plaintiffs to litigate the subject of these actions—LPG resistance to OPEC demands and efforts to undo and/or forestall nationalization.

other sources. No major member of the LPG submitted an offer" (A39).*

To say these two sentences do not state a joint refusal to deal claim against defendants is, of course, to be guilty of gross understatement. It is black-letter law that

> "*A demand and refusal is a prerequisite to a claim of concerted refusal to deal.* Royster Drive-In Theatres v. American Broadcast, etc., 268 F.2d 246 (CA 2 1959), cert. denied 361 U.S. 885. * * *" *Cleary* v. *National Distillers & Chem. Corp.*, 505 F.2d 695, 697 (9th Cir. 1974) (emphasis supplied).**

The two sentences do not indicate that any defendant was solicited, let alone that all were; that each had the product available for sale or was even in the business of selling low sulphur residual oil in New York; that the plaintiffs were ready, willing and able to pay the then current market price of whomever they did solicit; and that such current market price was lower than Nepco's prices at the time (the basis for a claim for damages for concerted refusal to sell them residual oil—although not the damage claim asserted by the complaints). Patently, the allegation that "[n]o major member of the LPG submitted an

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* The allegation in the Lilco complaint is identical except for the omission of the word "major" in the second sentence (A16).

** The requirements for establishing a refusal to deal were spelled out in more detail in Standard Oil Co. v. Moore, 251 F.2d 188, 198-99 (9th Cir. 1957), *cert. denied*, 356 U.S. 975 (1958):

> "* * * it could not be found that a particular source of supply was unavailable to Moore [plaintiff] unless it were shown that he offered, on a bona fide basis, to purchase gasoline and diesel fuel oil from such source and that he was ready, willing, and able to pay the current market price of such source applicable to retail gasoline dealers of Moore's classification and category, and that such source refused to sell to him at its current market price applicable to dealers of that classification and category."

offer'' provides no basis for asserting that plaintiffs were the target of any violation by defendants, let alone the one alleged in the complaints relating to resistance to Libyan or OPEC demands.

5. The "Flexible" Approach to Standing

Plaintiffs finally attempt to nullify standing limitations by proposing a ''flexible concept'' approach (App. Br. 23) under which judges would weigh ''the facts of each case'' (*id.*), hold them up to the ''light of the avowed Congressional purpose in enacting the antitrust laws'' (*id.*) and presumably intuitively feel whether the cause of justice would be advanced if a plaintiff's claims were to be entertained. In making this determination, the utilities propose that the judge factor in his general assessment of the prospects for suit against the defendants by other private parties and make certain that at least one plaintiff—however distant his relation to the violation and its anticompetitive effect may be—is allowed to prosecute an action against the defendants (*id.* at 29-31).*

The approach is diametrically opposed to that of this Court, which is based upon the desirability of having as definite, consistent and readily administrable a rule as possible. Thus, this Court advised in *Calderone* that it was adopting an

> ''* * * easily identifiable cut-off that avoids the unfortunate consequences of opening the flood-gate to all, no matter how remote their interest or incidental their re-

* In this connection, plaintiffs mention four cases pending against defendants in the district courts of this Circuit but attempt to distinguish their claims as not precisely identical to those here (App. Br. 29-30n). All four, however, as well as a fifth they omit, Harry B. Helmsley, *et al.* v. Arabian-American Oil Co., *et al.*, Civil Action

(footnote continued on next page)

> lationship * * * [W]e have drawn a line excluding those who have suffered economic damage by virtue of their relationships with 'targets' or with participants in an alleged antitrust conspiracy, rather than by being 'targets' themselves" (454 F.2d at 1296 and 1295).*

The notion that non-targets should be permitted to sue if targets do not, was also given short shrift by the Court since it would be totally inconsistent with the objective of a definite cut-off. Instead of opening the door to private parties who are not "targets," the Court stated:

> "In those cases where they [targets] fail to do so [sue], the Government may, of course, seek injunctive or punitive relief under other sections of the antitrust laws. See, *e.g.*, 15 U.S.C. §§ 1, 2, 4, 9" (454 F.2d at 1296).**

In addition, with the same objective of achieving a definite cut-off in mind, this Court in *Calderone* also emphatically rejected an approach that would depend upon a particularized case by case analysis:

> "The dissent does not feel itself bound by the previous decisions of this Circuit mentioned above, because it views each of these decisions as distinguishable from the present case. We fail to find any legal significance in the factual differences described at some length by Judge Levet. Indeed, even the dissenting judges in

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No. 75-467 (E.D.N.Y., filed March 31, 1975), raise the legality of the London Policy Group and the Libyan Producers' Agreement. In addition, plaintiffs in the Eastern District cases, except Rochdale Village, claim that Con Edison and Lilco automatically passed on their increased fuel costs to plaintiffs and seek recovery therefor from defendants.

* *See also* pp. 26-27, *supra*, with respect to the Court's reasons for rejecting the foreseeability test.

** *See also* Stern v. Lucy Webb Hayes Nat'l Training School, 367 F. Supp. 536, 537-38 (D.D.C. 1973).

two of the cases (*S.C.M. Corp. and Billy Baxter, Inc.*) indicated that their disagreements centered upon not whether the precedents were factually distinguishable from the case before them, but whether a different test should be applied" (454 F.2d at 1296-97 n.4).

The concept of standing for purposes of suit under § 4 of the Clayton Act, of course, has been an evolving one, frequently characterized by inconsistency, uncertainty, conflict, and somewhat elastic rubrics. These have included tests based upon remoteness, directness of injury, derivative injury, incidental or consequential injury, anticompetitive injury, target area and target or object of the violation. The recent decisions of this Court have successfully sought to bring order into this previously amorphous area by giving concretion to the concepts of directness and immediacy of injury through relating them to the particular area of the economy where the claimed violation and its anticompetitive effect occur, and clearly rejecting "foreseeability" as the standard. This has been an important achievement which has had an illuminating impact not only upon the district courts of this Circuit but throughout the federal system.*

There can be no doubt that the District Court correctly applied this Court's standing formulation in this case. Indeed, under any test for standing, this case would have to be dismissed.

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* *E.g.* In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973); Reibert v. Atlantic Richfield Co., 471 F.2d 727 (10th Cir.), *cert. denied*, 411 U.S. 938 (1973); Stern v. Lucy Webb Hayes Nat'l Training School, *supra;* Pandola v. Texaco Inc., 1975 Trade Cas. ¶60,232 (C.D. Cal. 1975); W. T. Grant Co. v. Christensen, 1975 Trade Cas. ¶60,324 (S.D.N.Y. 1975); Hans Hansen Welding Co. v. American Ship Bldg. Co., *supra;* Bywater v. Matshushita Elec. Indus. Co., *supra.*

II

Plaintiffs have not been injured by reason of the claimed violations.

As an additional independent ground for dismissing the antitrust claims, the Court below held that the necessary causal link between the violations alleged and plaintiffs' claimed injuries was missing. Once again, nothing in appellants' brief derogates from this conclusion.

The District Court correctly observed:

> "The principle is that in a civil antitrust action the plaintiff 'must establish a clear causal connection between the violation alleged and the injuries allegedly suffered'. *Molinas* v. *National Basketball Ass'n*, 190 F. Supp. 241, 243 (S.D.N.Y. 1961; I.R. Kaufman, D.J.), quoted with approval in *Salerno* v. *American League*, 429 F.2d 1003, 1004 (2d Cir. 1970), cert. denied, 400 U.S. 1001 (1971)" (A174).

It then properly applied this principle to the facts:

> "The complaint makes it clear that the cause of Lilco's injury (if any) was the increase by Nepco of its prices, an increase which Lilco says was an unjustified breach of contract and for which Lilco is suing. If Nepco's price increase was justified under the contract, then the justification was the increase by Libya of the purchase price to Nepco, an increase which was decided upon by Libya, a sovereign state over which defendants have no control. In any event, therefore, no 'causal connection', either 'clear' or otherwise, is shown between the claimed violations of defendants and the claimed injuries of Lilco" (A174-75).

The District Court next concluded that dismissal was also independently required under the principles set forth in this Court's decision in *GAF Corp.* v. *Circle Floor Co.*,

463 F.2d 752 (2d Cir. 1972), *cert. dismissed,* 413 U.S. 901 (1973). That decision explicitly restricted the scope of private antitrust suits to those seeking recovery for injuries resulting from the actual *anticompetitive effect* of the violation:

> "* * * only a person whose competitive business position was harmed by the *anticompetitive* effects of the alleged restraint of trade can maintain a treble damage action.
>
> "We hold that GAF has not been 'injured * * * by reason of' the violations of the antitrust laws alleged in the complaint because the alleged damages are not the economic result of the *anticompetitive* effects of those alleged violations" (463 F.2d at 759; emphasis the Court's).

According to the complaints, all of defendants' allegedly wrongful conduct had as its anticompetitive objective the retention of what plaintiffs claim was a monopoly position in the Persian Gulf. For the sake of the Persian Gulf, defendants assertedly were willing to jeopardize their rights in Libya and make it possible for Libya to sell more low sulphur crude oil to whoever wanted to buy it and at whatever terms were concluded by the parties. The complaints do not suggest that Libya's having this opportunity was anticompetitive. Rather, the theory of the complaints is that defendants should not be allowed to risk further loss of their Libyan crude oil business (by resisting the seizure of 51% of it) in order to preserve an allegedly wrongful situation in the Persian Gulf.

However, plaintiffs do not claim to have been injured by any competitive situation in the Persian Gulf—the area where the alleged monopoly supposedly was being maintained and where the *anticompetitive effect* of defendants'

conduct existed. Not only are they not engaged in the area of the economy where the asserted violation occurred, but the complaints do not even contain an allegation that plaintiffs at any time purchased any low sulphur residual fuel oil refined from Persian Gulf crude, either from Nepco or anybody else. Indeed, plaintiffs' memorandum below did not dispute that there was no "connection between the Gulf situation and the plaintiffs' injuries" (P. Br. 108) other than that the Gulf situation was a "motive behind defendants' Libyan activities" (*id.*).

The District Court held this to be fatal under *GAF* since plaintiffs had no competitive position in the trade injured by the claimed illegal restraint and, in fact, had no commercial position there whatever:

> "The claim that defendants had a monopoly and restrained trade relates to the Persian Gulf area, not to Libya. But there is no claim that anything done in the Persian Gulf area affected Lilco; on the contrary, the memorandum for Lilco seems to recognize that nothing done in the Persian Gulf area had any effect on Lilco except to supply a motive for the alleged activity in Libya" (A175).

Both bases for the determination that plaintiffs' complaints do not satisfy the proximate cause requirements of a private treble damage action are unassailable. Plaintiffs continue to make no pretense that the competitive situation in the Persian Gulf was of any concern to them. They acknowledge that they are seeking to recover the increases in the prices they paid to Nepco for low sulphur fuel oil (App. Br. 37); that they do not believe that the *force majeure* clause in the contract with Nepco justified Nepco's increasing its prices (*id.* at 10n); and that Libya "chose to

raise its price [to Nepco] drastically'' and independently of defendants (*id.* at 40). Nor do they claim that defendants' conduct required Libya to increase its prices. Defendants allegedly tried to make it difficult for Libya to sell the oil it nationalized by refusing to buy it themselves and by threats and suits against others who were interested in buying from Libya. Experience and logic suggest that a victim of a boycott will tend to reduce prices to attract patronage rather than raise them and run the risk of losing its remaining customers.*

As the foregoing is dispositive, plaintiffs' attack upon this aspect of the Court's decision is again confined to matters that are beside the point. Once more, plaintiffs impute rulings to Judge Wyatt which he did not make but for which plaintiffs criticize him, including

1. That his ''holding [was] *tantamount to engrafting* a 'privity,' or 'first purchaser' requirement on § 4 of the Clayton Act in contravention of previous authority'' (App. Br. 33-34; emphasis supplied);

2. That ''[*i*]*n effect*, the Court held on the pleadings that in order for a plaintiff to bring an antitrust action defendants' conduct must be the *sole* cause of *all* injury'' (*id.* at 16; emphasis on ''in effect'' supplied); and

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* The reason this did not occur here is, of course, a matter of widespread public knowledge: OPEC spokesmen make no secret of OPEC's responsibility for the price leaps.

> ''Towards the end of 1973, more fundamental changes in the oil industry took place. *The oil exporting countries were now the ultimate decision makers and the responsibility to determine prices became theirs* * * * they took the *decision to raise prices.*'' Sheik Yamani's address before the Ninth World Energy Conference on ''Oil and Gas Resources Now and in the Future,'' September 23, 1974 (emphasis supplied). [The address is an exhibit to ''Reply Memorandum in Support of Defendants' Motion to Dismiss Antitrust Claims'' in the Lilco Record on Appeal.]

3. That "[f]inally, the Court holds, *in effect*, that public utilities can never bring an antitrust action" (*id.* at 14; emphasis supplied).

Since the District Court made none of these "in effect" or "tantamount" rulings, further comment would be superfluous.*

Plaintiffs also repeat their practice of inventing new factual allegations which are not to be found in the complaints, including the assertions that Nepco was a cost-plus wholesaler (App. Br. 30, 39), despite the complaints' allegations to the contrary (A6, 9, 29, 32); that NOC became the only dealer in Libyan low sulphur oil (App. Br. 15), despite the complaints' allegations that "independent" petroleum companies continued to operate there (A11, 34); and that all defendants rather than just Socal did not lift crude oil that was not nationalized (App. Br. 9, 37), when this is without basis either in the complaints or otherwise (A68).

Nothing plaintiffs do, however, casts any doubt on the validity of the holding of the District Court that the necessary causal connection between the alleged wrongdoing and their injuries is absent.**

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* *See also* pp. 25-26, *supra*. It might be noted, however, that while the District Court did not find it necessary to reach the derivative injury principles of *Calderone*, this hardly warrants plaintiffs' assertions that no such principles exist (App. Br. 34). Nor, obviously, are the District Court's quotations from the *GAF* decision, any more than that decision itself, to be understood as precluding public utilities from ever seeking redress for antitrust violations.

** Needless to say, the foregoing rulings with respect to standing and proximate cause are fully applicable to Lilco's Second Claim, as well as its First. The material factual allegations of the First Claim are realleged by reference in the Second and constitute that Claim's only non-conclusory allegations. Lilco's decision to acquiesce in the District Court's suggestion that both claims stand or fall together is,

(footnote continued on next page)

III

The issues of standing and proximate cause were ripe for determination.

The utilities argue that the Court below erred in dismissing the antitrust claims of their complaints on the pleadings (App. Br. 45-49) and contend that the standing issue "should properly have been left for trial" (*id.* at 47).

The law in this Circuit is well settled to the contrary. This Court has repeatedly concluded that an antitrust plaintiff's lack of standing to sue is a threshold question properly determined by preliminary procedural motion, including specifically motions addressed to the complaint. *E.g. Nassau County Ass'n of Ins. Agents* v. *Aetna Life & Cas. Co., supra; Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc., supra; SCM Corp.* v. *Radio Corp. of America, supra.**

Early determination of the standing question is plainly desirable in order to eliminate non-maintainable actions at the earliest possible time. Thus, this Court has affirmed a

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therefore, entirely understandable (A111-12). *See also* App. Br. 12. In any event, Lilco's complaint concedes that since 1960 it has purchased no residual fuel oil from anyone other than Nepco (A9). It thus was not the "target" of the wrongdoing asserted in the Second Claim, nor could it have been injured as the proximate result thereof.

* *See also, e.g.,* GAF Corp. v. Circle Floor Co., *supra*; Billy Baxter, Inc. v. Coca-Cola Co., *supra*; SCM Corp. v. Radio Corp. of America, *supra*; Bookout v. Schine Chain Theatres, Inc., 253 F.2d 292 (2d Cir. 1958); Productive Inventions, Inc. v. Trico Products Corp., 224 F.2d 678, 679 (2d Cir. 1955), *cert. denied,* 350 U.S. 936 (1956); Bywater v. Matshushita Elec. Indus. Co., *supra*; Walder v. Paramount Publix Corp., 132 F. Supp. 912 (S.D.N.Y. 1955).

District Court's *sua sponte* dismissal of claims for lack of standing. *Lieberthal* v. *North Country Lanes, Inc.*, 221 F. Supp. 685, 689 (S.D.N.Y. 1963), *aff'd*, 332 F.2d 269 (2d Cir. 1964). As the courts have explained:

> "* * * if plaintiffs are without right to maintain this action, then the defendants are entitled to be protected against the heavy burden of expense and effort entailed in a protracted and intricate trial. Moreover, the proper administration of justice requires, in the interests of other litigants who await and are entitled to a trial, that the Court's energies and time be not deflected by an unnecessary and time-consuming trial." *Raubal* v. *Engelhard Minerals & Chem. Corp.*, 364 F. Supp. 1352, 1355 (S.D.N.Y. 1973) (quoting from *Schwartz* v. *Broadcast Music, Inc.*, 180 F. Supp. 322 (S.D.N.Y. 1959).

Nor are plaintiffs' statements with respect to leave to amend anything other than a red herring. Their brief asserts that:

> "At a minimum, the District Court was constrained by the decisions of this Court to grant the utilities leave to amend the complaints to correct any perceived defects in the pleadings. But the Court below denied even this opportunity to the utilities, stating in effect that there were no facts which could be pleaded to make the complaints sufficient (A175)" (A[illegible] Br. 47).

The District Court did not base its decision upon "any perceived defects in the pleadings" but rather upon the fact that what *was* pleaded clearly established Libya or the Persian Gulf states (instead of plaintiffs) as the target of the claimed antitrust wrongdoing and clearly demonstrated that plaintiffs' injuries were not proximately caused by such wrongdoing.

Nor, indeed, have plaintiffs ever sought leave to amend or indicated which allegations they now wish to alter—despite the foregoing misleading suggestion to the contrary. Moreover, even if plaintiffs had properly sought leave to amend, since no amendment could cure the lack of standing flowing from the utilities' own core allegations as to the nature and purpose of defendants' wrongful conduct and the causes of their injury, such leave should properly be denied.

In *Foman* v. *Davis*, 371 U.S. 178 (1962), the Supreme Court indicated that leave to amend is ordinarily granted "[i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief" (371 U.S. at 182). However, Justice Goldberg emphasized that leave to amend should be denied where the "futility of amendment" is evident (*id.*).

Similarly, this Court has recognized that leave to amend is properly denied in circumstances such as are present here. In *Billy Baxter, Inc.* v. *Coca-Cola Co., supra*, this Court concluded its opinion by explaining:

> "Denial of the motion for leave to serve an amended complaint two months after filing of the appellees' summary judgment motion was also proper, since the verbal changes suggested would not have cured the absence of factual support for a showing of standing, indicated by prior judicial admissions" (431 F.2d at 189).

On all accounts, plaintiffs' references to their being denied "even" leave to amend are baseless.

Conclusion

For all of the foregoing reasons, it is respectfully submitted that the decision below was correct and should be affirmed.

June 9, 1975

Respectfully submitted,

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Service of 4 copies of the within Brief is hereby admitted this 9th day of June 1975

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